United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Affidavit

76-6032

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6032

HERBERT LEO PALM,
Plaintiff-Appellant,

—v.—

THE VETERANS ADMINISTRATION OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the Defendants-Appellees.

RICHARD N. PAPPER,
PATRICK H. BARTH,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF FOR APPELLEES

Preliminary Statement

On October 6, 1975, the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, entered an Order dismissing plaintiff-appellant Herbert Leo Palm's complaint as barred by the two-year statute of limitations of the Federal Tort Claims Act, 28 U.S.C. § 2401(b). Mr. Palm subsequently moved pursuant to Fed. R. Civ. P. 60(b)(2) for relief from that Order. In a memorandum filed January 28, 1977, the District Court denied the motion for relief. Mr. Palm has now appealed from both Orders. Neither the District Court's endorsement dated October 6, 1975 nor its opinion of January 28, 1977 has been reported.

Issues Presented

1. On an appeal from a denial of a motion for relief from judgment, may an appellant attack the underlying Order from which he sought relief from judgment in the District Court.

2. Does a plaintiff's alleged mental incompetence toll the statute of limitations under the Federal Tort Claims Act?

3. Does the Federal Tort Claims Act's two-year statute of limitations bar an action which was not commenced until more than nine years after the claim accrued?

Statement of Facts

Herbert Leo Palm, a naturalized citizen and veteran of the armed forces of the United States, brought this action against the United States and the Veterans Administration ("V.A.") alleging that agents of the V.A. had committed acts of medical malpractice in connection with treatment he received in September and October 1965. The complaint, which predicates jurisdiction on the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2675* and seeks damages of $1,000,000.00, was filed on February 14, 1975, after the V.A. had rejected Mr. Palm's written claim on or about August 15, 1974. Although he now appears *pro se*, Mr. Palm was represented by counsel when he commenced the action.

The essential allegations of the complaint are that on or about September 1, 1975, V.A. doctors denied Mr.

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* The complaint also purports to be based on "common law principle". However, 28 U.S.C. § 2679 provides that in tort actions against the United States, the remedies provided by the Federal Tort Claims Act are exclusive.

Palm medical treatment and refused to admit him to the Kingsbridge V.A. Hospital, despite the fact that he was suffering from numerous severe illnesses of which V.A. physicians were aware. The complaint alleges that the physicians at the V.A. Hospital failed to conduct adequate tests to ascertain the nature and extent of Mr. Palm's illnesses. It also alleges that an electrocardiogram was performed in a manner which aggravated an existing allergy condition, thereby causing Mr. Palm great pain and discomfort. (Complaint ¶ 8)

Mr. Palm also alleged in his complaint that on or about October 23, 1965, he was forcibly and involuntarily brought by the police to the Kingsbridge V.A. Hospital, where he was detained for several hours, and was then transferred by the police from the V.A. Hospital to Jacobi Hospital and ultimately to the psychiatric ward of Bellevue Hospital, allegedly at the instigation of the doctors at the V.A. Hospital. Mr. Palm's commitment at Bellevue lasted for approximately thirteen days. (Complaint ¶ 9) Mr. Palm filed an administrative claim with the V.A. on August 2, 1974. The claim was denied on August 15, 1974. (Complaint ¶ 13)

The defendants subsequently moved to dismiss the complaint as barred by the two-year statute of limitations of the Federal Tort Claims Act, 28 U.S.C. § 2401 (b). Mr. Palm, who was still represented by counsel, opposed the motion. On October 6, 1975, the District Court granted the motion and dismissed the complaint. (Endorsement filed October 6, 1975)

On October 4, 1976, Mr. Palm, appearing *pro se*, moved pursuant to Fed. R. Civ. P. 60(b)(2) for relief from the District Court's previous Order dismissing the action. Mr. Palm contended that his "lay opinion" concerning the alleged malpractice had not been "confirmed" until September 1974. He contended that his condition

was such that he was unable to discover the malpractice until 1974, although he denied that he had ever been mentally ill.* (Affidavit of Herbert Leo Palm in Support of Motion for Relief from Judgment dated September 29, 1976.)

The District Court denied the motion, holding that insanity, which may constitute a legal disability that tolls the statute of limitations in most states, does not toll the statute of limitations under the Federal Tort Claims Act. (Opinion filed January 28, 1977)

ARGUMENT

POINT I

This Appeal Should Be Dismissed Insofar As It Seeks Review Of The District Court's Order Dismissing The Complaint.

In his notice of appeal and in his brief, the plaintiff-appellant purports to be appealing from the District Court's January 28, 1977 Order denying his motion for relief from judgment *and* from the District Court's October 6, 1975 Order which Mr. Palm sought to attack in his Rule 60(b) motion. While he may appeal from the denial of his motion for relief from judgment, he may not, nearly two years later, attack the original Order of dismissal. This Court, in *Daily Mirror* v. *New York Daily News*, 533 F.2d 53, 56 (2d Cir.), *cert. denied*,

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* In Paragraph 9 of his affidavit, Mr. Palm stated: "I strenuously contest the accuracy of the aforesaid medical reports [from two New York psychiatric hospitals] and, without prejudice, deny that I am now or ever have been mentally ill." *See also* Appellant's Brief at 6.

429 U.S. 862 (1976), set forth the limits of an appeal from the denial of a motion for relief from judgment:

> An order denying relief under Rule 60(b) is an appealable order, but the appeal brings up only the correctness of the order itself. *Hines* v. *Seabord Air Line R.R. Co.*, 341 F.2d 229 (2d Cir. 1965); *Wagner* v. *United States*, 316 F.2d 871 (2d Cir. 1963). It does not permit the appellant to attack the underlying judgment for error that could have been complained of on direct appeal. *Sampson* v. *Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970); 9 J. Moore, Federal Practice ¶ 204.12[1] [2d ed. 1973].

See also Pagan v. *American Airlines*, 534 F.2d 990, 992-93 (1st Cir. 1976).

The principles underlying the indulgence courts generally show *pro se* litigants are not applicable here. Mr. Palm was represented by counsel in connection with the defendants' motion to dismiss, and thus was not in the position of a *pro se* litigant unable to determine how best to proceed after the dismissal of the complaint. Even if he were not represented by counsel, to permit Mr. Palm to attack the underlying Order of dismissal well over a year after it had been filed would create an unwarranted exception to the time limitations of the Federal Rules of Appellate Procedure, and would do violence to the limits set repeatedly by this Court on the scope of an appeal from a denial of a motion for relief from judgment.

Therefore, the sole issue properly before this Court is the only question which was presented to the District Court on the plaintiff's Rule 60(b) motion, *viz.*, whether mental incompetence serves to toll the two-year statute of limitations for tort actions against the United States.

POINT II

Mental Incompetence Does Not Toll The Statute Of Limitations Under The Federal Tort Claims Act.

Mr. Palm's motion from relief from the Order of the District Court and his appeal in this Court rest in part on the notion that he was mentally incompetent during the years he let pass before asserting his claim, and that the statute of limitations therefore was tolled until 1974. Even assuming that Mr. Palm could not discover the alleged malpractice because of his mental incompetence, his disability would not toll the statute of limitations under the Federal Tort Claims Act. The cases in which the issue has arisen have consistently held that while insanity may operate as a legal disability in many states, it does not toll the statute of limitations in 28 U.S.C. § 2401(b). *Casias* v. *United States*, 532 F.2d 1339, 1342 (10th Cir. 1976); *Accardi* v. *United States*, 435 F.2d 1239, 1241 n.2 (3d Cir. 1970); *Jackson* v. *United States*, 234 F. Supp. 586, 587 (E.D.S.C. 1964). Plaintiff has offered no reason why this uniform rule should be rejected in this case.

POINT III

This Action Is Barred By The Statute Of Limitations.

28 U.S.C. § 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is

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* As noted *supra* at p. 4, the plaintiff-appellant, in his sworn affidavit, has denied that he suffers from any mental illness.

> begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The statutory bar to a tort claim filed more than two years after it accrues is a jurisdictional requirement which cannot be waived; after the two-year period has run, the District Court has no jurisdiction over the action. *Rosario* v. *American Export-Isbrandsten Lines*, 531 F.2d 1227, 1230-31 (3d Cir. 1976); *Ashley* v. *United States*, 413 F.2d 490, 492 (9th Cir. 1969); *Mann* v. *United States*, 399 F.2d 672, 673 (9th Cir. 1968). The enactment of the Federal Tort Claims Act represents a waiver of sovereign immunity from suit. As such, the provisions of the Act, as well as the statute of limitations contained in § 2401(b) governing tort actions brought against the United States under the Act, must be strictly construed. *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *Brown* v. *General Service Administration*, 507 F.2d 1300, 1307 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976); *Childers* v. *United States*, 442 F.2d 1299, 1303 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971); *Binn* v. *United States*, 389 F. Supp. 988, 991 (E.D. Wis. 1975).

In a medical malpractice action against the United States, the claim "accrues" for purposes of § 2401(b) when the claimant discovers or in the exercise of reasonable diligence should have discovered the acts constituting the alleged malpractice. *Camire* v. *United States*, 535 F.2d 749, 750 (2d Cir. 1976); *Reilly* v. *United States*, 513 F.2d 147, 148-9 (8th Cir. 1975); *Toal* v. *United States*, 438 F.2d 222, 224-25 (2d Cir. 1971); *Coyne* v. *United States*, 411 F.2d 987, 988 (5th Cir. 1969). There is no doubt that Mr. Palm was fully aware of the acts constituting the alleged malpractice at the time those acts occurred and, therefore, that the claim accrued at the time the acts were performed in 1965. According to the

allegations of the complaint, Mr. Palm was aware at the time of his examination at the Kingsbridge V.A. Hospital on September 1, 1965, that tests he thought would have been conducted were not performed. He immediately knew that the electrocardiogram administered on September 1, 1965 had caused an allergic reaction. He knew at the time of his commitment to Bellevue Hospital on or about October 23, 1965 that, as he saw it, he should not have been hospitalized.* He was therefore fully aware in 1965 of the alleged acts of malpractice, but he did not present his claim to the Veterans Administration until August 2, 1974—nearly nine years later.

The plaintiff-appellant seeks to circumvent the two-year statute of limitations by reference to the "continuous treatment rule", arguing that his being under continuing treatment for his various conditions tolls the statute of limitations.

Those courts which have indicated that continuing treatment for a condition may toll the statue of limitations have held that the principle is inapplicable if the treatment "was not continuous by the same doctor (or an associate) or the same hospital for the required

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* Although the allegations relating to Mr. Palm's commitment to Bellevue Hospital are placed under the rubric of negligence in the complaint, they may be read as alleging false imprisonment. "It is ... the substance of the claim, and not the language used in stating it, that controls." *Blitz* v. *Boog*, 328 F.2d 596, 599 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964). However, claims for false imprisonment are excluded from the Government's waiver of sovereign immunity under the Federal Tort Claims Act. 28 U.S.C. § 2680(h). Therefore, Mr. Palm's claim for damages stemming from false imprisonment is barred by the express terms of § 2680(h). *Johnson* v. *United States*, 547 F.2d 688, 691 (D.C. Cir. 1976); *United States* v. *Artieri*, 491 F.2d 440, 446 n.2 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974); *Blitz* v. *Boog*, *supra*.

period." *Camire* v. *United States*, *supra*, 535 F.2d at 750; *see also Accardi* v. *United States*, 356 F. Supp. 218 (S.D.N.Y. 1973). In *Ciccarone* v. *United States*, 486 F.2d 253 (3d Cir. 1973), the plaintiff, like Mr. Palm in the case at bar, saw a number of other physicians over the course of several years after the alleged malpractice by a V.A. physician, but he did not see the V.A. physician again after the allegedly negligent treatment was over. The Court held:

> On August 6, 1963, not only did the personal treatment of appellant by this individual physician cease but there was no allegedly negligent activity by any government physician after that date. Therefore, August 6, 1963 was the date on which appellant's continuous treatment terminated and his duty to diligently investigate the deleterious consequences of that treatment arose. His failure to pursue his remedy within two years of that date operates as bar to recovery.
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> * * * * *
>
> [I]t is the continued existence of the physician-patient relationship which tolls the statute of limitations. Once this personal, confidential relationship terminates, the patient must exercise diligence in seeking a remedy for any suspected wrongdoing on the part of his physician.

486 F.2d at 257.

The case at bar is indistinguishable. In October 1965, Mr. Palm ended his contacts with the V.A. Hospital where the alleged acts of malpractice occurred. Mr. Palm nowhere alleges that he returned to the V.A. Hospital or ever had any further contact with the doctor who was allegedly negligent. Instead, according to paragraphs 10 and 12 of the complaint, and as set forth at great length in his brief on this appeal, he sought medical care for his various conditions at other institu-

tions, both in this country and abroad.* The continuous treatment rule thus does not toll the statute of limitations in this case. Mr. Palm's claim therefore accrued in 1965 and he is barred by the two-year statute of limitations from maintaining this action.

CONCLUSION

For the foregoing reasons, the Order of the District Court should be affirmed.

Dated: New York, New York
August 26, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the Defendants-Appellees.

RICHARD N. PAPPER,
PATRICK H. BARTH,
Assistant United States Attorneys,
Of Counsel.

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* Even assuming, *arguendo*, that Mr. Palm's myriad ailments were aggravated by the alleged acts of negligence in 1965, and that Mr. Palm did not become aware of the full extent of his injuries until 1974, the statute of limitations would not be tolled. The running of a statute of limitations does not await determination of the full extent of injury. It begins to run as soon as damage is discernible at the time of the negligent act, even though the ultimate damage is unknown. *Ciccarone* v. *United States*, *supra*; *Portis* v. *United States*, 483 F.2d 670 (5th Cir. 1973); *Quinton* v. *United States*, 304 F.2d 234 (5th Cir. 1962).

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the two copies
26th day of August 19 77 she served /~~a copy~~ of the within Brief for Appellees

Airmail
by placing the same in a properly postpaid franked /envelope addressed:

Herbert Leo Palm
Bahnpostlagernd
600 Frankfurt/Main 11
Germany

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
26th day of August ,19 77

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1979